Supreme Court, U.S.
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No.

In The
Supreme Court of the United States

October Term, 1994

ALFREDO GONZALEZ,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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68 pp

QUESTION PRESENTED FOR REVIEW

WHETHER THE COURT SHOULD RESOLVE A SPLIT IN THE CIRCUIT COURTS CONCERNING WHETHER THE SO CALLED "GOOD FAITH" EXCEPTION TO THE EXCLUSIONARY RULE APPLIES TO WARRANTLESS ARRESTS?

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

A. Procedural History 3

B. Statement of the Facts 6

Detective Vance's Story During the Suppression Hearing 6

Detective Vance's Story At Jeannette Gonzalez' First Trial 9

Detective Vance's Story At Jeannette Gonzalez' Second Trial 10

Detective Vance's Story Prior To the Decision In Gonzalez I 11

The Proceedings On Remand From Gonzalez I 12

REASON FOR GRANTING THE WRIT 13

CONCLUSION 26

CERTIFICATE OF SERVICE 27

TABLE OF AUTHORITIES

Page

Cases

Abell v. Commonwealth,
272 S.E.2d 204, 221 Va. 607 (1980) 17

Great Lakes Dredge & Dock Co. v. Tanker,
957 F.2d 1575 (11th Cir. 1992) 6

Hill v. California,
401 U.S. 797 (1971) 23, 24

Illinois v. Krull,
480 U.S. 340 (1987) 15

Illinois v. Rodriguez,
110 S.Ct. 2793 (1990) 17-18, 19-20

Morse v. State,
604 So. 2d 496 (Fla. 1st DCA 1992) 17

Ott v. State,
325 Md. 206, 600 A.2d 111 (1992) 17

People v. Buffo,
202 Ill. App. 3d 240,
559 N.E.2d 908 (1990) 17

People v. Fields,
785 P.2d 611 (Colo. 1990) 17

Sanders v. United States,
339 A.2d 373 (D.C. App. 1975) 24

State v. Evans,
No. CR-92-0228-PR (Ariz. January 13, 1994),
1994 Ariz. LEXIS 8 17

United States v. Curzi,
867 F.2d 36 (1st Cir. 1989) 16

United States v. DeLeon,
561 F.2d 421 (2d Cir. 1977) 24

United States v. De Leon-Reyna,
930 F.2d 396 (5th Cir. 1991) (en banc) 24

United States v. Delgadillo-Velasquez,
856 F.2d 1292 (9th Cir. 1988) 24

United States v. Glasser,
750 F.2d 1197 (3d Cir. 1984) 18

United States v. Glover,
725 F.2d 120 (D.C. Cir. 1984) 24

United States v. Gonzalez,
969 F.2d 999 (11th Cir. 1992) ..... *passim*

United States v. Leon,
468 U.S. 897 (1984) 14-16, 21

United States v. McQuagge,
787 F. Supp. 637 (E.D. Tex. 1992) 22

United States v. Milian-Rodriguez,
759 F.2d 1558 (11th Cir.), *cert. denied*,
474 U.S. 845 (1976) 16

United States v. Morgan,
743 F.2d 1158 (6th Cir. 1984) 16

United States v. Moss,
963 F.2d 673 (4th Cir. 1992) 18, 20, 22

United States v. Ramirez-Lujan,
976 F.2d 930 (5th Cir. 1992),
cert. denied, 113 S.Ct.
1587 (1993) 16, 18, 21

United States v. Scales,
903 F.2d 765 (10th Cir. 1990) 16

United States v. Thomas,
787 F. Supp. 663 (E.D. Tex. 1992),
aff'd mem., 983 F.2d 1062
(5th Cir. 1993) 21, 22

United States v. Whiting,
781 F.2d 692 (9th Cir. 1986) 16

United States v. Williams,
622 F.2d 830 (5th Cir. 1980) (en banc),
cert. denied, 449 U.S. 1127 (1981) 25

United States v. Winsor,
846 F.2d 1569 (9th Cir. 1988)
(en banc) 16

Statutes and Rules

5th Cir. Rule 47.5.3 21

Miscellaneous

LaFave, *Search and Seizure*, Vol. 1,
§ 1.3(g) (2d ed.) 25, 26

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OPINIONS BELOW

The August 21, 1992 opinion of the United States Court of Appeals for the Eleventh Circuit is reported at *United States v. Gonzalez*, 969 F.2d 999 (11th Cir. 1992) (hereinafter "*Gonzalez I*"). A copy of *Gonzalez I* is attached hereto as **APPENDIX A**. The February 16, 1994 opinion of the United

States Court of Appeals for the Eleventh Circuit in *United States v. Gonzalez*, No. 93-4004 (11th Cir.) (per curiam) (hereinafter "*Gonzalez II*"), is unreported. A copy of *Gonzalez II* is attached hereto as **APPENDIX B**.

JURISDICTION

The opinion of the United States Court of Appeals for the Eleventh Circuit in *Gonzalez II* was filed on February 16, 1994. The Eleventh Circuit denied rehearing on April 8, 1994. This petition for a writ of certiorari followed within 90 days of the latter date. *See* Supreme Court Rule, Rule 13. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment IV provides:

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

A. Procedural History

The petitioner, Alfredo Gonzalez, was charged in a two count indictment on October 11, 1989 with conspiracy to possess and with possessing cocaine. Also indicted were the petitioner's wife, Jeanette Gonzalez, and one Ernesto Barrios. (R1-1.)[1]

On November 14, 1989, Alfredo and Jeanette Gonzalez filed a motion to suppress evidence. (R1-14.) Following an evidentiary hearing, on January 11, 1990, the district court denied the motion. (R1-41.)

Due to a scheduling conflict of her counsel, Jeanette Gonzalez's trial was severed from Barrios's trial. (*See* R1-48.) Barrios was tried and convicted of both counts of the indictment on January 5, 1990. (R1-39.)

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[1] All record citations herein will be to the Record-On-Appeal as filed in the United States Court of Appeals for the Eleventh Circuit and will be abbreviated as "R" followed by the appropriate volume and page numbers.

On January 24, 1990, the district court allowed Alfredo Gonzalez to enter a conditional plea of guilty, while reserving his right to appeal the order denying his motion to suppress. (R1-46.) On March 28, 1990, Gonzalez was sentenced to 121 months of imprisonment, 5 years of supervised release and 500 hours of community service. (R1-60.)

While Gonzalez' first appeal was pending in the Eleventh Circuit, Mrs. Gonzalez went to trial. In an attempt to convince the jury that Mrs. Gonzalez was guilty, Detective Jeffrey Vance testified that he saw her conducting counter-surveillance at a marina where the drugs were being delivered. However, when 2 independent witnesses testified that Mrs. Gonzalez was *not* the woman Detective Vance saw, the first trial resulted in a hung jury. By the time Mrs. Gonzalez came to trial a second time, Detective Vance admitted he was wrong about his identification of Mrs. Gonzalez, and Mrs. Gonzalez was acquitted. (*See* R1-104.)

In light of Detective Vance's altered testimony, Gonzalez obtained a new evidentiary hearing on his motion to suppress before the district court. (*See* R4.) Despite Detective Vance's altered testimony, the district court again denied the motion. (R2-124.) However, on August 21, 1992, the Eleventh Circuit reversed and remanded the case back to the district court. *See Gonzalez I*. The Eleventh Circuit ruled that absent Detective Vance's mistaken beliefs, the agents lacked probable cause to arrest Gonzalez. However, the court ruled that if Detective Vance's mistakes were "objectively reasonable," then they could still be considered in determining whether Gonzalez' warrantless arrest was constitutional under the Fourth Amendment. The court remanded for "specific fact finding" concerning the objective reasonableness of Detective Vance's beliefs about the existence of probable facts. *Id*.[2]

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[2] In light of the remand, Gonzalez did not seek *en banc* or Supreme Court review of the Panel's unprecedented extension of the "good faith" exception to the exclusionary rule to non-warrant situations. Until the decision in *Gonzalez II*, *see infra*, the issue was not ripe for determination. *See Great Lakes* (continued...)

On December 10, 1992, the district court conducted a hearing following the remand. (R5.) Shortly thereafter, the court summarily ruled that Detective Vance's conduct was "objectively reasonable." Gonzalez again appealed and on February 16, 1994, the Eleventh Circuit affirmed without oral argument. *Gonzalez II*.

B. Statement of the Facts

Detective Vance's Story During the Suppression Hearing

The government's investigation of the petitioner commenced in the fall of 1989 when DEA Special Agent David Tinsley received a tip from two informants, a man and a woman, concerning the Gonzalezes and Ernesto Barrios. (R3-2.) The tipsters informed Agent Tinsley that the yacht would be arriving at a marina somewhere in Ft. Lauderdale with a shipment of 20 to 30 kilograms of cocaine. (R3-35.) The tipsters also said that Mrs. Gonzalez would be leaving her Coral

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[2](...continued)
Dredge & Dock Co. v. Tanker, 957 F.2d 1575, 1578 (11th Cir. 1992).

Gables home to retrieve the shipment. Accordingly, Agent Tinsley, with assistance from the Coral Gables Police Department, set up surveillance of the Gonzalez' home.

Mrs. Gonzalez subsequently left the house in her Mercedes. She followed an Oldsmobile at a high rate of speed on I-95 to the Bahia Mar Marina in Ft. Lauderdale. (R3-6, 40, 47.) They, in turn, were followed by Coral Gables Detective Jeffrey Vance. (R3-6, 40.) When Detective Vance arrived at the marina, he insisted that he saw Mrs. Gonzalez go into and exit another yacht which was for sale at the boat yard *and then re-enter the Mercedes*. (R3-41.) When questioned for more details about his observations, Detective Vance explained that, to get a better view, he got onto the flying bridge of a different boat and walked "to the end of the dock." (R3-42.) He claimed that he walked directly past the woman he claimed was Mrs. Gonzalez and "made some comment [to her] about the evening." *Id.* The woman said something back to him in

Spanish. Moreover, he denied having any difficulty making the identification. *Id.*

Detective Vance then claimed he saw Mrs. Gonzalez get down from the flying bridge and enter the driver's side of the Mercedes. (R3-42.) Agent Vance continued to observe the scene and saw Mr. Gonzalez and Barrios on board the Royal Highness Two. (R3-43.) After a few minutes, Mr. Gonzalez and Barrios left the vessel carrying three travel bags. (R3-43.) They placed the bags inside the trunk of the Mercedes and then entered the vehicle themselves. (R3-7, 44.) Mrs. Gonzalez drove back to her home, along with Ernesto Barrios.

As the vehicle pulled into the driveway of the home, 10-12 armed agents surrounded the vehicle and immediately placed Barrios and the Gonzalezes under arrest. (R3-52.) Shortly, thereafter, Gonzalez signed a form, consenting to a search of the vehicle. (R3-9, 29, 67; Government's Exhibit 18.) Inside the agents found the cocaine.

Detective Vance's Story At Jeannette Gonzalez's First Trial

At Mrs. Gonzalez' first trial, Detective Vance maintained that the woman he saw conducting counter-surveillance from the flying bridge, the woman he walked passed, saw "clearly" and even spoke to, *was Mrs. Gonzalez*. (R1-104, EXHIBIT B, at pp. 12-14, 46.) Furthermore, he unequivocally testified that the woman whom he saw in the Mercedes was the woman he saw on the flying bridge and that both were Mrs. Gonzalez. (*Id*. at pp. 17, 47 and 55.) However, Mrs. Gonzalez and 2 independent witnesses, Mr. and Mrs. Martinez, testified that the woman on the dock was *not* Mrs. Gonzalez but, instead, was an unknown female. Detective Vance later acknowledged witnessing both Mrs. Gonzalez and Mrs. Martinez testify and to having been told about the substance of Mr. Martinez' testimony. (R1-104, EXHIBIT A, at pp. 60-61.) Despite knowing that two independent witnesses refuted his testimony, on rebuttal Detective Vance continued to maintain that he was *certain* that he saw Mrs. Gonzalez, not someone else, on the flying bridge. Indeed,

he testified unequivocally that Mr. and Mrs. Martinez were not even present at the marina. (R1-104, EXHIBIT B, at pp. 92-93.

Detective Vance's Story At Jeannette Gonzalez's Second Trial

The jury trying Mrs. Gonzalez could not reach a verdict, resulting in a mistrial. Before the retrial of Mrs. Gonzalez, Detective Vance investigated the defense witnesses, Mr. and Mrs. Martinez. Forced to concede that they were telling the truth, he changed his story: "My testimony today is that I now believe that she [Mrs. Gonzalez] was not the lady on the flying bridge of the vessel." *Id.* at p. 66. He also retracted his story that he saw the woman on the flying bridge get into the Mercedes. Now, he testified that he had merely "assumed" it was the same woman. *Id.* at p. 63.

Agent Tinsley testified at Mrs. Gonzalez' second trial that he had relied upon Detective Vance's earlier stories in filing the criminal complaint. Detective Vance had originally informed him that on the way back from the marina, the Mercedes conducted "heat runs" or counter surveillance in

different areas before pulling into the driveway. (R1-104-10.) However, at both of *Mrs.* Gonzalez' trials, Detective Vance acknowledged that Mrs. Gonzalez did *not* conduct any such maneuvers. And, at the second trial, Detective Pagliery confirmed that no "heat runs" or counter-surveillance occurred. Rather, due to a median strip in the middle street in from of the Gonzalez home, Mrs. Gonzalez had to make a U-turn in order to get into her driveway. Thus, at the second trial, Detective Vance testified that there was nothing "at all" unusual about the turn. (R1-104-10-11.)

Detective Vance's Story Prior To the Decision In Gonzalez I

At the evidentiary hearing conducted before the district court while this case was on appeal before the Eleventh Circuit in *Gonzalez I*, Detective Vance again testified, along with co-defendant Ernesto Barrios. Detective Vance claimed he was merely "mistaken" when he identified Mrs. Gonzalez as the woman who was conducting "counter-surveillance" on the flying bridge of the vessel. (R4-10).

The Proceedings On Remand From Gonzalez I

Detective Vance testified one more time in the district court on remand from the Eleventh Circuit's decision in *Gonzalez I*. (R5.) He maintained that his mistake was only one of "identification." (R5-13.) However, he offered no explanation for how he could have testified, repeatedly, that he had seen *the same woman* on the flying bridge get into the Mercedes and drive off with the drugs. He did not explain why he failed to recognize his mistake after learning that two independent witnesses, the Martinezes, had refuted his testimony. Nor did he explain how he could have testified, unequivocally, that the Martinezes were not even present at the marina.

Following the hearing, the district court summarily ruled that Detective Vance's conduct was "objectively reasonable." (R5-32; *see also* R2-135.) Based on the district court's ruling, the Eleventh Circuit in *Gonzalez II* affirmed the district court's denial of the motion to suppress.

REASONS FOR GRANTING THE WRIT

Certiorari should be granted to resolve a split in the Circuits concerning the applicability of the "good faith" exception to the exclusionary rule in warrantless situations.

The Eleventh Circuit in *Gonzalez I* contended that its construction of the Fourth Amendment was not about "the good faith exception to the exclusionary rule." *Gonzalez I*, 969 F.2d at 1004, n. 7. While the court correctly perceived that the situations in which the "good faith" exception applied all involved "circumstances in which evidence is permitted despite the *absence* of probable cause," the court contended that this case did not involve the "absence of probable cause." *Id*. (emphasis by the court in *Gonzalez I*). Rather, the court framed the issue as "whether, as a matter of law, probable cause existed in the first instance." *Id*. The court then went on to misinterpret and improperly extend Supreme Court precedent to create a new rule of law. According to the Eleventh Circuit,

law enforcement officers can arrest citizens (or, by implication, seize evidence) *without* facts establishing probable cause so long as the officers are later deemed to have been "objectively reasonable" in *thinking* that the requisite facts existed.

Contrary to the Eleventh Circuit, it indeed has extended the "good faith" exception to the exclusionary rule far beyond any previously acknowledged limits. And, its ruling does create "circumstances in which evidence is permitted despite the *absence* of probable cause." The court's ruling constitutes an erroneous departure from well established precedent and should be reversed by this Court. Even "reasonably" mistaken conduct by law enforcement officers cannot be excused, without completely eviscerating the probable cause requirement itself.

In *United States v. Leon*, 468 U.S. 897 (1984), this Court held that evidence need not be suppressed when police obtain evidence through objective good faith reliance on a facially valid warrant that is later found to lack probable cause. 468 U.S. at 913, 920. The Court created the "good faith" defense by

focusing on the purpose of the exclusionary rule -- deterrence of overreaching by law enforcement. Since a warrant was obtained in *Leon* by a neutral magistrate, it was the magistrate, not the law enforcement officers, who was ultimately responsible for violating the defendant's constitutional rights by issuing the warrant. *Leon*, 468 U.S. at 916. Because a magistrate "[has] no stake in the outcome of criminal prosecutions," excluding the evidence would not act as a deterrent against future actions by the magistrate. Hence, it made no sense to punish law enforcement for the error of a magistrate. *Id.* at 914.

Since this Court decided *Leon*, the "good faith" exception has been applied in other situations where law enforcement officers relied upon an external source of authority, such as a statute which later turns out to be invalid or not to authorize the action taken. *See, e.g., Illinois v. Krull*, 480 U.S. 340, 349-50 (1987) (good faith exception applied to administrative warrants because it serves no purpose to penalize the officer for the legislature's error). With the exception of the Fifth Circuit and

now the Eleventh Circuit in *Gonzalez II*, every court has limited the "good faith" exception to such circumstances. *See, e.g., United States v. Milian-Rodriguez*, 759 F.2d 1558, 1563 (11th Cir.) (refusing to extend good faith exception to consensual search), *cert. denied*, 474 U.S. 845 (1986); *United States v. Scales*, 903 F.2d 765, 768 (10th Cir. 1990) (limiting good faith exception to warrant contexts); *United States v. Curzi*, 867 F.2d 36, 44-45 (1st Cir. 1989) (restricting good faith exception to warrant contexts); *United States v. Winsor*, 846 F.2d 1569, 1579 (9th Cir. 1988) (en banc) (good faith exception applies "only to searches conducted in good faith reliance on a warrant or a statute later declared to be unconstitutional"); *United States v. Morgan*, 743 F.2d 1158, 1165 (6th Cir. 1984) (*Leon* not relevant where officers had no warrant); *United States v. Whiting*, 781 F.2d 692 (9th Cir. 1986) (rejecting extension of *Leon*'s good faith exception to warrantless searches). *But see United States v. Ramirez-Lujan*, 976 F.2d 930, 932-34 (5th Cir. 1992) (extending good faith exception to warrantless stop), *cert.*

denied, 113 S.Ct. 1587 (1993). Many state courts have also limited the doctrine to its theoretical justifications; *See, e.g., State v. Evans*, No. CR-92-0228-PR (Ariz. January 13, 1994), 1994 Ariz. LEXIS 8; *People v. Fields*, 785 P.2d 611 (Colo. 1990); *Morse v. State*, 604 So. 2d 496 (Fla. 1st DCA 1992); *People v. Buffo*, 202 Ill. App. 3d 240; 559 N.E.2d 908 (1990) (citations omitted); *Ott v. State*, 325 Md. 206, 600 A.2d 111, n. 3 (1992); *Abell v. Commonwealth*, 272 S.E.2d 204, 221 Va. 607 (1980).

To be sure, this Court in *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990), applied the good faith exception to a situation where law enforcement officers based their conduct on a well-recognized *exception to* the warrant requirement itself. Thus, in *Rodriguez*, 110 S.Ct. 2793 (1990), the Court found valid a consensual search where law enforcement officers reasonably but mistakenly believed that the occupants of an apartment had common control over the premises, and, therefore, had the authority to consent to a search of the apartment. However, in

Rodriguez, the officers' mistake did not involve the facts essential to probable cause. No court, other than *United States v. Ramirez-Lujan*, 976 F.2d 930 (5th Cir. 1992), has extended the good faith exception to excuse law enforcement "mistakes" concerning *the basic facts necessary to establish probable cause*.[3]

The Eleventh Circuit's decisions herein are also in direct conflict with the Fourth Circuit's decision in *United States v. Moss*, 963 F.2d 673 (4th Cir. 1992). In that case, two college students rented a remote cabin in a national forest. To reach

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[3] The Eleventh Circuit in *Gonzalez I*, citing *United States v. Glasser*, 750 F.2d 1197 (3d Cir. 1984), believed that the Third Circuit supported its ruling. However, that case did not involve a situation where the law enforcement officers would have lacked probable cause but for a law enforcement officer's mistaken belief that some fact existed when it did not. In *Glasser*, a surveillance officer believed that the defendant exited the house under surveillance carrying the same drug-filled bag that had been traced there. In fact, the defendant exited the house carrying the drugs but in a different, albeit similarly looking, bag. The Third Circuit held that probable cause existed to arrest the defendant even if the true facts (*i.e.*, that the bags were different but similar looking) were taken into account. 750 F.2d at 1206. In the instant case, the true facts are that an unknown female, not Mrs. Gonzalez, was seen on the flying bridge and, therefore, no counter-surveillance was taking place. Under the actual facts, no probable cause existed in this case.

the cabin, they drove into the forest, parked their car and then hiked the remaining distance to the cabin. A few days later, a Forest Service officer noticed that the car was parked illegally. In order to determine who the car belonged to, he made an inquiry at the Forrest Service Office to see if the nearby cabin was rented. He was mistakenly informed that it was not. The Officer nonetheless went to the cabin to investigate. Although he saw signs of occupation, he entered the unlocked cabin and conducted a brief search. During the search, he noticed a bag of marijuana, allegedly in "plain view," and subsequently cited the students for possession of the unlawful substance.

On appeal, the students challenged the legality of the warrantless seizure. The government, in turn, principally argued that the seizure was justified, because the Forest Service Officer reasonably believed in "good faith" that the cabin was unoccupied and/or that the owner of the vehicle was lost or in trouble. The government relied primarily on *Illinois v. Rodriguez*, 110 S.Ct. 2793 (1990), for the proposition that the

"good faith" exception should excuse the otherwise illegal entry and seizure. However, the Fourth Circuit rejected any extension of *Rodriguez*, explaining that "the good faith exception ... has not been converted into a general license to proceed outside those established constraints, guided only by general notions of reasonableness and good faith in conducting searches and seizures." 963 F.2d at 677.

The Eleventh Circuit's application of the "good faith" exception to the exclusionary rule in *Gonzalez* frees the exception from its original "moorings" even more so than in *Moss* and gives law enforcement "a general license to proceed outside [the doctrine's] established constraints, guided only by general notions of reasonableness and good faith in conducting searches and seizures." At least the warrantless search conducted in *Moss* was arguably based on exceptions to the warrant requirement, exigent circumstances or emergency. Here, no such exception applied.

Although the Fifth Circuit has held that the "good faith" exception may sometimes apply to warrantless stops and arrests, *see United States v. Ramirez-Lujan*, 976 F.2d at 932-34; *United States v. De Leon-Reyna*, 930 F.2d 396, 400-01 (5th Cir. 1991) (en banc) (per curiam), the arrest in this case would not be sanctioned even by the Fifth Circuit. "[T]he good faith exception has never been applied to a situation where the police mistakenly believe the facts justify an arrest when in fact they do not." *United States v. Thomas*, 787 F. Supp. 663 (E.D. Tex. 1992) (Justice, J.), *aff'd mem.*, 983 F.2d 1062 (5th Cir. 1993).[4]

In *Thomas*, Judge Justice found a warrantless arrest of a drug suspect to have been without probable cause. The suspect was in one of two vehicles initially stopped along a

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[4] Pursuant to Local Rule 47.5.3 of the Fifth Circuit, a copy of its unpublished decision in *Thomas* is attached hereto as APPENDIX C. Under Local Rule 47.5.1 of the Fifth Circuit, opinions such as those in *Thomas* are not published because they have been decided "on the basis of well-settled principles of law." The unpublished opinion does not question Judge Justice's reasoning concerning the inapplicability of *Leon*. *See* APPENDIX C, at p. 10.

highway for traffic offenses. After Thomas consented to a search of his vehicle, the officers found a marijuana cigarette butt in a rear ashtray and arrested him. Judge Justice ruled that the officers lacked probable cause to arrest Thomas for the violation and went on to reject the government's contention that the illegal arrest should be excused under the "good faith" doctrine. 787 F. Supp. at 683. As noted above, the court recognized that the exception had never been applied to excuse the absence of actual facts supporting probable cause. "Such an application [of the good faith exception] is not logically related to the reasons for the exception." *Id.* *Accord United States v. McQuagge*, 787 F. Supp. 637 (E.D. Tex. 1992).

The Eleventh Circuit's decision in *Gonzalez II* is in direct conflict with the Fourth Circuit's decision in *Moss* and the Fifth Circuit's decision in *Thomas*, *i.e.,* whether Detective Vance's mistaken beliefs "that the facts that [he has] observed" at the marina and at Mr. Gonzalez' home "constitute probable cause, when they do not in actuality." This Court should grant the

instant petition for a writ of certiorari to resolve this split in the Circuits concerning the application of the good faith exception.

The primary basis for the Eleventh Circuit's rulings in *Gonzalez I* and *Gonzalez II* came from an unjustified and unprecedented extension of *Hill v. California*, 401 U.S. 797 (1971). *See Gonzalez I*, 969 F.2d at 1004-05. In *Hill v. California*, 401 U.S. 797 (1971), law enforcement officers had probable cause to believe that Hill had committed a crime and that evidence of the crime would be found in Hill's apartment. Upon arriving at the apartment, one Miller answered the door. Although Miller denied he was Hill, the officers mistook him for Hill, arrested him and searched the apartment. This Court ruled that the mistaken arrest did not undermine the search, agreeing with the lower courts that "'[w]hen the police have probable cause to arrest one party, and when they reasonably mistake a second party for the first party, then the arrest of the second party is a valid arrest.'" 401 U.S. at 802 (citation omitted). Courts following *Hill* all involve situations where the

police *had probable cause to arrest the person sought. See, e.g., United States v. Glover*, 725 F.2d 120 (D.C. Cir. 1984); *United States v. DeLeon*, 561 F.2d 421 (2d Cir. 1977); *Sanders v. United States*, 339 A.2d 373 (D.C. App. 1975). Where a police officer "relies on observed activities of the *wrong man* to establish probable cause to make the arrest," however, *Hill* does not apply. *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1297 (9th Cir. 1988) (emphasis in original).

The extension of the exclusionary rule to the issue of probable cause itself also has policy ramifications that justify the granting of the petition for a writ of certiorari herein. Such an extension would have the inevitable effect of diluting the probable cause standard itself. Law enforcement officers would be free to make "mistakes" or embellish the objective facts sufficiently to meet the requisite probable cause standard without any realistic fear of any consequences. As one commentator put it:

> Moreover, and perhaps of ultimate importance, there is the fact that a broader good faith exception, applicable even when the police conduct did not have the prior approval of a magistrate, would be perceived and treated by the police as a license to engage in the same conduct in the future. That is, the risk in such tampering with the exclusionary rule "is that police officers may feel that they have been unleashed" and consequently may govern their future conduct by what passed the good faith test in court on a particular occasion rather than on the traditional Fourth Amendment standards of probable cause, exigent circumstances, and the like.

See 1 LaFave, *Search and Seizure*, § 1.3(g), at 79 (2d ed.) (footnotes omitted). The very purpose of the exclusionary rule is to deter such conduct by law enforcement.

Moreover, the intervention of a third party or external factor -- such as a magistrate or statute -- makes the current good faith standard relatively easy to apply. Absent such "moorings," trial courts will be faced with the often impossible task of trying to discern how a "reasonably trained" law enforcement officer, *United States v. Williams*, 622 F.2d 830, 841 n. 4a (5th Cir. 1980) (en banc), *cert. denied*, 449 U.S. 1127 (1981), would act under a wide range of circumstances most judges are

ill-equipped to evaluate. *See* 1 LaFave, *Search and Seizure*, § 1.3(g), at 78 (arguing against the extension of the good faith doctrine to warrantless situations for this reason).

CONCLUSION

For all of the foregoing reasons, the petitioner respectfully requests that his Petition For a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was mailed this 12 day of ~~April~~ May 1994 to: The Solicitor General, United States Department of Justice, 10th & Constitution Avenues, N.W., Washington, D.C. 20530; United States Department of Justice, Criminal Division, Appellate Section, P.O. Box 899, Ben Franklin Station, Washington, D.C. 20044-0899; and Mike Walleisa, Assistant United States Attorney, United States Attorney's Office, 155 South Miami Avenue, Miami, Florida 33130.

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Alfredo F. GONZALEZ,
Defendant-Appellant.

No. 90-5333

United States Court of Appeals,
Eleventh Circuit

Aug. 21, 1992

Defendant was convicted before the United States District Court for the Southern District of Florida, No. 89-698-CR-JWK, James W. Kehoe, J., of conspiring to possess with intent to distribute and possessing with intent to distribute at least five kilograms of cocaine, and he appealed denial of his motion to suppress evidence. The Court of Appeals, Ednıondson, Circuit Judge, held that where detective's mistaken belief about countersurveillance formed part of basis for determination that there was probable cause to arrest, remand was necessary to determine whether mistake was an objectively reasonable mistake and whether it was objectively reasonable, under the circumstances, for detective to rely on his impressions in calculating the probable cause.

Remanded.

1. Arrest 63.4(2)

"Probable cause" to arrest exists when law enforcement officials have facts and circumstances within their knowledge

sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime. U.S.C.A. Const.Amend.4.

See publication Words and Phrases for other judicial constructions and definitions.

2. Criminal Law 1181.5(7)

Where probable cause to arrest defendant was based partly on officer's mistaken belief about countersurveillance, remand was necessary to determine whether mistake was an objectively reasonable mistake and whether it was objectively reasonable, under the circumstances, for detective to rely on his impressions in calculating probable cause. U.S.C.A. Const.Amend.4.

3. Arrest 63.4(1)

Policeman's mistaken belief of fact can properly contribute to determination of probable cause to arrest and can count just as much as a correct belief as long as the mistaken belief was reasonable in light of all the circumstances; when district court accepts mistaken belief as a factor to be counted, court should first find that the mistake was, itself, a reasonable one. U.S.C.A. Const.Amend.4.

G. Richard Strafer, Jose M. Quinon, Quinon & Strafer, P.A., Miami, Fla., for defendant-appellant.

Dexter Lehtinen, U.S. atty., Miami, Fla., Michael Walleisa, Linda Collins Hertz, Lynne W. Lamprecht, Asst. U.S. Attys., Ft. Lauderdale, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Southern District Court for the Southern District of Florida.

Before TJOFLAT, Chief Judge, EDMONDSON, Circuit Judge, MORGAN, Senior Circuit Judge.

EDMONDSON, Circuit Judge:

Defendant Alfredo Gonzalez entered a conditional plea of guilty to charges of conspiring to possess with intent to distribute and possessing with intent to distribute at least five kilograms of cocaine. He now appeals the district court's denial of his motion to suppress evidence, claiming law enforcement officers lacked probable cause for his arrest and that the search of his car was thus tainted by the illegal arrest. We REMAND the case to the district court for additional fact finding as explained below.

FACTS

Testimony at the Motion to Suppress

On September 28, 1989, Special Agent David Tinsley of the Drug Enforcement Administration (DEA) received the first in a series of tips about the cocaine smuggling activities of Alfredo Gonzalez and Ernesto Barrios. The telephone informants, a man and a woman, declined to identify themselves.

Over the next few days, Agent Tinsley received seven or eight calls from the tipsters, who provided him with specific information including the names of Gonzalez, his wife, Jeanette Gonzalez, and Barrios; physical descriptions of the three conspirators; vehicle descriptions, including license plate numbers; the address and description of the Gonzalez residence; a description of a yacht called the "Royal Highness II"; estimations of the yacht's time and place of arrival at one of the two south Florida marinas; the ultimate destination of the cocaine; and the method of shipping the cocaine in secret

compartments built into the yacht. Tinsley verified names, addresses, licenses and vehicle descriptions. He also discovered that United States Customs suspected Gonzalez and Barrios of smuggling and that the Royal Highness II had been stopped and searched before, but no contraband had been found. He was unable to verify previous successful smuggling trips. The female tipster also told Tinsley that Mrs. Gonzalez would be travelling by yacht to the Bahamas to pick up cocaine, but Mrs. Gonzalez never made the trip.[1]

Based on the tips, Tinsley immediately set up surveillance of the Gonzalez' home in Coral Gables with assistance from the local police department. On the evening of October 1, 1989, the anonymous callers informed Tinsley that the yacht would be arriving at a marina in Fort Lauderdale with a shipment of 20 kilograms of cocaine and that Mrs. Gonzalez would be travelling to the marina in a blue Mercedes with a certain tag number to pick up Mr. Gonzalez and Barrios. The next day, as predicted, Mrs. Gonzalez left the house in the blue Mercedes and drove north to the Bahia Mar Marina in Fort Lauderdale. She drove at a high rate of speed, closely following a red Oldsmobile. Coral Gables Detective Jeffrey Vance followed the two cars. He had trouble getting into the marina, bur approximately five to ten minutes after the Mercedes and Oldsmobile reached the marina, he saw the Oldsmobile leave.

Detective Vance's delay entering the marina prevented him from seeing Mrs. Gonzalez for a few minutes after she parked the car. He next saw Mrs. Gonzalez when she stepped off the Royal Highness II and walked to another vessel, a

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[1] Barrios later testified that the original plan was for Mrs. Gonzalez to go to the Bahamas, but that plans changed due to bad weather.

demonstrator for sale by the marina. She climbed up to the demonstrator's flying bridge and sat watching for approximately ten or fifteen minutes. While she was there, Vance walked past and exchanged pleasantries with the woman, who replied in Spanish[2] Mr.s Gonzalez eventually got down from the flying bridge and went back to the blue Mercedes.

Vance then observed Mr. Gonzalez and Barrios inside the Royal Highness II. They left the vessel approximately fifteen minutes later, carrying three bags which appeared to be heavy. They took the bags to the trunk of the Blue Mercedes, then drove south with Mrs. Gonzalez. On the return trip, the Mercedes drove carefully, never exceeding the speed limit.

The car drove past the Gonzalez residence, then made a U-turn and pulled in.[3] Ten to twelve agents and detectives were waiting. Half were in uniform and half were in street clothes. The agents/detectives were armed; according to Gonzalez, they had guns drawn. Agent Tinsley, Detective Vance and Detective Garcia approached the car. They identified themselves and told Gonzalez, his wife, and Barrios to get out of the car and sit on the ground apart from each other. According to Vance, "[the conspirators] were under arrest as soon as we got there."

Tinsley and Garcia then walked with Gonzalez to the back of the car. They testified that they first advised Gonzalez of his *Miranda* rights;[4] then told him they believed narcotics

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[2]Vance was in plain clothes and travelling in an unmarked police car.

[3] A median strip blocked a direct turn into the driveway.

[4] *Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966).*

were in the trunk and requested his consent to search the car. They explained the consent to search form in both English and Spanish. In response to Gonzalez' question, they told him that they would not search his house.[5] After reviewing the consent form, Gonzalez requested that Tinsley change the word "residence" to "vehicle" and write in "Blue Mercedes" with the appropriate license tag number. Once these changes were made, Gonzalez signed the form.

Tinsley discovered three travel bags in the trunk. The bags contained coffee wrapped in dark plastic garbage bag material, and inside the coffee, cocaine. While Tinsley searched, Garcia asked Gonzalez how much was in the trunk. Gonzalez replied "twenty;" later measurements confirmed a total of twenty kilos, as predicted by the informants. Gonzalez, his wife, and Barrios were then taken to the police station.

The grand jury indicted all three with conspiring to possess with intent to distribute and possessing with intent to distribute at least five kilograms of cocaine. Both Mr. and Mrs. Gonzalez filed a motion to suppress, which was denied following an evidentiary hearing. The district court decided that the officers had probable cause to believe there was cocaine in the trunk. The court also concluded that the consent to search had been freely, voluntarily, and intelligently given by Gonzalez without force, threats, or promises, and that Gonzalez had been advised of his *Miranda* rights at the scene of his arrest. Gonzalez entered a conditional plea of guilty, reserving his right to appeal the order denying his motion to suppress.

Testimony at the Trial of Jeanette Gonzalez

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[5] Gonzalez denied being advised of his *Miranda* rights and testified that the agents threatened to search his house unless he signed the consent form.

Mrs. Gonzalez' first trial ended in a hung jury. She was acquitted on retrial. During Mrs. Gonzalez' second trial, detective Vance acknowledged that he had made a mistake in his previous identification of Mrs. Gonzalez as the woman on the flying bridge. He stated that he had made his initial identification based upon his observations that the female who drove the Mercedes from the Gonzalez home to the marina had blond hair, the woman he had observed on the flying bridge of the boat at the marina had blond hair, Mrs. Gonzalez had been previously described by an anonymous caller as a blond latin female and later, a blond Mrs. Gonzalez was arrested along with her husband and Barrios in the Mercedes where the cocaine was stored. Vance realized his mistake after he had the opportunity to see and hear the testimony of one of the defense witnesses during the first trial of Jeanette Gonzalez. At the second trial, he testified that Jeanette Gonzalez was not the person on the flying bridge of the boat at the Fort Lauderdale marina. He also modified his characterization of the U-turn near the Gonzalez' home as surveillance, instead agreeing that there was "nothing unusual" about the turn.

Testimony at the Post-Judgment Hearing for Additional Fact Finding

Based upon the changes in testimony, Mr. Gonzalez moved for additional fact finding regarding his prior motion to suppress. At the ensuing evidentiary hearing, Vance testified that he had not met Mrs. Gonzalez before the date of her arrest. As he followed her to the marina that day, he was never closer than half a block and he had been able to determine only that the vehicle was operated by a female with blond hair. Because it was dusk when he observed the woman on the flying bridge, he was able to ascertain only that this woman was a latin female with blond hair who fit the description of Jeanette Gonzalez. Vance reiterated that he realized his mistake after

he had the opportunity to see and hear the testimony of one of the defense witnesses during the first trial of Mrs. Gonzalez.

The district court found that Detective Vance had not deliberately lied, but had made a mistake in identification. The court summarily denied Gonzalez' request for additional fact finding. No explanation of the factors considered in redetermining probable cause was provided.

PROBABLE CAUSE TO ARREST GONZALEZ

[1] Gonzalez contends that his warrantless arrest was unsupported by probable cause, and that, therefore, the district court erred in denying his motion to suppress the evidence (cocaine) seized. Probable cause to arrest exists when law enforcement officials have facts and circumstances within their knowledge sufficient to warrant a reasonable belief that the suspect had committed or was committing a crime. *Beck v. Ohio, 379 U.S. 89, 91, 85 S.Ct. 223, 225, 13 L.Ed.2d 142 (1964).* Probable cause determinations traditionally have been guided by reviewing the totality of the circumstances. *Illinois v. Gates, 462 U.S. 213, 233, 103 S.Ct. 2317, 2329, 76 L.Ed.2d 527 (1983).*

The Informants' Tips

[2] In *Illinois v. Gates,* the Supreme Court approved a "totality of the circumstances" approach to determining when information provided by an informant is sufficient to create probable cause. *Id.* at 230-34, 103 S.Ct. at 2328-30. The tip in *Gates* was an anonymous letter stating that respondents, husband and wife, were engaged in selling drugs; that the wife would drive their car to Florida on a certain date to be loaded with drugs, and the husband would fly down in a few days to drive the car back; that the car's trunk would be loaded with drugs; and that respondents had over $100,000 worth of drugs in their basement. *Id.* at 225, 103 S.Ct. at 2325. The Court

decided that, while an informant's "veracity," "reliability," and "basis of knowledge" are relevant factors in the probable cause analysis, corroboration of the details of an informant's tip by independent policy work is of significant value, particularly in the context of an anonymous informant. *Id.* at 230, 242, 103 S.Ct. at 2328, 2334.

The government points out that the DEA and Coral Gables police did, in fact, corroborate most of the information provided by the unknown callers. But a review of the record shows that the details Agent Tinsley was actually able to confirm consisted of innocent facts such as names, addresses and descriptions of the parties involved.

Although "innocent behavior frequently will provide the basis for showing of probable cause ... [in]n making a determination of probable cause the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts." *Gates, 462 U.S. at 243-44 n. 13, 103 St.Ct. at 2335 n. 13.* Even Mrs. Gonzalez' predicted trip to the marina was not inherently suspicious. *See United States v. Solomon, 728 F.Supp. 1544, 1548 (S.D. Fla. 1990)* ("Unlike the short trip to another state in *Gates*, a trip northward on the Florida Turnpike is not suspicious. Unlike Gates, [defendants] reside in Florida. The trip was as readily explainable as a pleasure excursion as a drug run."). And Tinsley was unable to discovery any trip by Mrs. Gonzalez to the Bahamas or any proof that the Royal Highness II, Mr. Gonzalez or Barrios had transported cocaine before. Tinsley could only corroborate "the innocent activities of a couple who lived at a certain address, owned certain personalty, and who happened to take a ... [short] trip

northward." *Solomon, 728 F.Supp at 1548*[6] We worry that the informants' tips and corroboration in this case might have given officers no more than reasonable suspicion sufficient to make a brief investigatory stop. *See Alabama v. White, 496 U.s. 325, 110 S.Ct. 2412, 110 L.Ed.2d 301 (1990)* (reasonable suspicion for stop found where some of anonymous caller's information was incorrect, tip was not as detailed and corroboration not as complete as in *Gates*, but much of tip corroborated); *United States v. Campbell, 920 F.2d 793 (11th Cir.1991)* (reasonable suspicion to stop found where police corroborated unknown informant's last minute details predicting drug transport and route to be taken by woman named "Yoli," accompanied by three armed Mexicans).

Other Factors To be Considered For Probable Cause

Along with reliable or corroborated tips, the observations and experiences of the law enforcement officers working a case must be weighed as a part of the totality of the circumstances that might create probable cause for an arrest. In this case, we think Mrs. Gonzalez' driving patterns and the detective's perception that counter-surveillance measures were in effect significantly enhanced the measure of suspicion which officers already had based on the corroborated tips.

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[6] Some of the tips were verified after the arrest, for example, the quantity of cocaine (twenty kilos), the secret compartments on the yacht, and that the original plan actually required Mrs. Gonzalez to travel to the Bahamas. But this information plays no role in a probable cause determination: the court must decide whether the objective facts available to the officers *at the time of arrest* were sufficient to justify a reasonable belief that an offense was being committed. *See Beck, 379 U.S. at 96, 85 S.Ct. at 228.*

The driving patters which we think contributed to probable cause are the speeding trip to the marina, and the contrasting return home, during which the speed limit was never broken. These maneuvers may be open to innocent explanations. But the determination that probable cause exists for a warrantless arrest is fundamentally a factual analysis that must be performed by the officers *on the scene.* At the time of the arrest and in conjunction with the reasonable suspicion created by corroboration of the informants' tips, the officers could reasonably have believed that the speeding reflected an effort to get the cocaine shipment unloaded quickly, and the slow, careful return drive reflected an effort to avoid attracting attention while the stash was in the car.

Officers were also aware that a U-turn, while in this case necessary to circumvent the median on the street where the Gonzalezes lived, often functions as a useful counter-surveillance tool to see if the driver is being followed. "The officers' experience may be considered in determining probable cause.... Conduct innocent in the eyes of the untrained may carry entirely different 'messages' to the experienced or trained observer." *United States v. Fouche, 776 F.2d 1398, 1403-04 (9th Cir. 1985)* (clothing description contributed to probable cause even though clothing not unusual; sweating and apparent nervousness also contributed to probable cause even though day was hot; iv viewed alone, these factors were insignificant, but important in the totality to link arrestee to robbery); *United States v. McGlynn, 671 F.2d 1140, 1144 (8th Cir. 1982)* (officers' observations of defendant's potentially noncriminal activities exchanging packages and behaving furtively entitled to some weight in probable cause determination.

Particularly important in the probable cause calculation is Detective Vance's impression that Mrs. Gonzalez was conducting courter-surveillance from her post on the flying bridge at the marina. That he was ultimately found to be

mistaken does not detract from the legitimate contribution this impression - *if his mistake was objectively reasonable*[7] - made at the time to the totality of the circumstances leading to probable cause.

The Supreme Court has repeatedly recognized "the need to allow some latitude for honest mistakes that are made by officers in the dangerous and difficult process of making arrests and executing search warrants." *Maryland v. Garrison, 480 U.S. 79, 87, 107 S.Ct. 1013, 1018, 94 L.Ed.2d 72 (1987)* (search of defendant's apartment by mistake was valid because objective facts available to officers at the time suggested there was only one apartment on third floor and there was no clear distinction

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[7] Much of Gonzalez' supplemental brief to this court is about the good faith exception to the exclusionary rule. But this case is not about the good faith exception. That exception keeps evidence from being suppressed when law enforcement officers obtain evidence through objective good faith reliance on a facially valid warrant that is later found to lack probable cause, *see United States v. Leon, 468 U.S. 897, 913, 920, 104 St.Ct. 3405, 3415, 3419, 82 L.Ed.2d 677 (1984)*, and has been extended to situations where officers are called upon to interpret or rely upon an external source of authority such as a statute, which later turns out to be invalid or not to authorize the action taken, *see, e.g., Illinois v. Krull, 480 U.s. 340, 107 S.Ct. 1160, 94 L.Ed.2d 364 (1987); United States v. Williams, 622 F.2d 830, 844 (5th Cir. 1980) (en banc)*; or where officers have based their conduct on recognized exceptions to the warrant requirement itself, such as consent. *See Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 111 L.Ed.2d 148 (1990).* The exception thus always involves circumstances in which evidence is permitted despite the *absence* of probable cause. In this case, in contrast, we review whether, as a matter of law, probable cause existed in the first instance.

between third party's apartment and third-floor premises). More recently the court appointed out that "in order to satisfy the 'reasonableness' requirement of the Fourth Amendment, what is generally demanded of the many factual determinations that must regularly be made by agents of the government ... is not that they always be correct, but that they always be reasonable." *Illinois v. Rodriguez, 497 U.S. 177, 110 S.Ct. 2793, 2800, 111 L.Ed.2d 148 (1990)* (warrantless entry valid when based upon consent of third party whom police, at time of entry, reasonably believe to possess common authority over premises, but who in fact does not.) *See also Texas v. Brown, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983)* ("[probable cause] does not demand any showing that such a belief be correct or more likely true than false").

In *Hill v. California, 401 U.S. 797, 91 S.Ct. 1106, 28 L.Ed.2d 484 (1971),* the Court considered the validity of the arrest of a man named Miller based upon the mistaken belief that he was Hill. The police had probable cause to arrest Hill and believed in good faith that Miller was Hill when they found Miller in Hill's apartment.

> The upshot was that the officers in good faith believed Mill was Hill and arrested him. They were quite wrong as it turned out, and subjective good-faith belief would not in itself justify either the arrest or the subsequent search. But sufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment and on the record before us the officers' mistake was understandable and the arrest a reasonable response to the situation facing them at the time.

Hill, 401 U.S. at 803-04, 91 S.Ct. at 1110-11.

The Second Circuit has upheld the arrest and search incident to arrest where police arrested the wrong man. *United*

States v. DeLeon, 561 F.2d 421 (2d Cir.1977). In view of all the information available to the police, including the fact that the defendant fit the general description of the suspects who allegedly attempted to pass counterfeit bills, was driving a highly distinctive car which fit the description of the car driven by suspects, and evinced consciousness of guilt by attempting to lock the car door when police approached, the officers had probable cause to believe defendant was one of the suspects they sought. The arrest was lawful even though the defendant wasn't one of the men who had attempted to pass the bill. *Id.* at 423.

In *United States v. Glasser, 750 F.2d 1197, 1206 (3d Cir. 1984),* DEA agents knew that a package mailed from Jamaica and delivered by postal authorities as part of a controlled delivery contained contraband. They were also aware that it is common practice for drug smugglers to have a package delivered to someone other than the ultimate recipient to avoid detection. The defendant arrived empty-handed at the house to which the package was delivered a little more than an hour after delivery and left five to ten minutes later, carrying a brown bag. Agents mistakenly thought he was carrying the original control package (which had not been a brown bag) and arrested defendant. The arrest was upheld, despite the error, which had contributed to probable cause to believe defendant was carrying contraband. *Id.* at 1206. *See also United States v. DeLeon-Reyna, 930 F.2d 396, 399-401 (5th Cir.1991) (en banc)* (reasonable suspicion for stop found when border agent relies on incorrect information from other agents if, after reviewing totality of circumstances, objectively reasonable officer would have relied on information in deciding whether to stop vehicle); *United States v. Garcia, 942 F.2d 873, 876-77 (5th Cir.1991)* (based on totality of circumstances, border agent's reliance on incorrect information provided by dispatcher did not invalidate stop of vehicle), *(cert. denied, - U.S. -, 112 S.Ct. 989, 117 L.Ed.2d 151 (1992).*

Because many situations which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part. But the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability." *Brinegar v. United States, 338 U.S. 160, 176, 69 St.Ct. 1302, 1311, 93 L.Ed. 1879 (1949).* We agree that the district court's decision that Detective Vance's misidentification of the blond latin female on the flying bridge at the marina was an honest mistake; but the important questions remain whether the mistake was an objectively reasonable mistake and whether it was objectively reasonable, under the circumstances, for the detective to rely on his impressions in calculating probable cause.

If the answer to these questions is "yes," probable cause undoubtedly existed for the arrest underlying this appeal. If the answer is "no," this case is considerably closer and raises doubts. We therefore remand the case for further proceedings in the district court, including specific fact finding on these important questions about the reasonableness, at the time and under the circumstances, of Detective Vance's mistaken belief about countersurveillance.[8]

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[8] Gonzalez contends that the government has waived the issue of reliance on a mistaken view of the facts (or as Gonzalez phrased it, good faith mistake, *see supra* note 7). After reviewing the record, we disagree. Although the government made certain ambiguous comments and referred more than once to the court's determination of probable cause "even if the court were to disregard Detective Vance's testimony regarding the presence of Mrs. Gonzalez on the flying bridge...", it is not plain to us that the government intended that the court necessarily disregard this testimony or conceded that the information ought to be given no weight. Combined with the

(continued...)

[3] A policeman's mistaken belief of fact can properly contribute to a probable cause determination and can count just as much as a correct belief as long as the mistaken belief was reasonable in the light of all the circumstances. When a district court accepts a mistaken belief as a factor to be counted, the court should first find that the mistake was, itself, a reasonable one.

REMANDED.

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[8](...continued)
government's assertions of innocent mistake, these comments do not establish a waiver of the issue.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 93-4004
Non-Argument Calendar

D.C. Docket No. 89-698-CR-KEHOE

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

ALFREDO GONZALEZ,

Defendant-Appellant.

Appeal from the United States District Court
for the Southern District of Florida

(February 16, 1994)

Before TJOFLAT, Chief Judge, EDMONDSON and DUBINA, Circuit Judges

PER CURIAM:

This is the second time this case has come before us. The case is about probable cause for an arrest that led to a search. Part of the information relied upon by the police for probable cause was, in fact, later determined to be mistaken. Although the information relied upon was inaccurate, we held that it could still count toward probable cause as long as the police's mistake was objectively reasonable and as long as it was objectively reasonable for the police to rely on such information at the time.

On remand, the district court held an evidentiary hearing. The district court found and concluded that the police's beliefs and acts, although mistaken, were objectively reasonable. We agree. Therefore, probable cause existed for the pertinent arrest.

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

NO. 92-4699

Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

MERRICK BILL THOMAS, JR.,

Defendant-Appellant.

Appeal from the United States District Court
for the Eastern District of Texas
(CR6-91-52(01))

Before KING, DAVIS, and WIENER, Circuit Judges.

PER CURIAM:

Merrick Bill Thomas, Jr. appeals the district court's denial of his motion to suppress cocaine found in search of his car. We affirm.

Thomas and others were indicted on three cocaine counts. Thomas moved to suppress evidence. The district court held a two-day suppression hearing at which Thomas and arresting officer Barry Washington testified. The district court issued a lengthy memorandum opinion denying, for the most part, Thomas's motion to suppress.

Thomas then pleaded guilty to possessing cocaine with intent to distribute and conspiracy to possess and aiding and abetting. Pursuant to Fed. R. Crim P. 11(a)(2), the plea was conditional, reserving to Thomas the right to appeal the district court's denial of his motion to suppress. The district court sentenced Thomas to serve two concurrent 120-month prison terms and one five-year term of supervised release. Thomas appeals the denial of his suppression motion.

Chain of Events.

Washington's testimony provided most of the facts of the events relating to the seizure of the evidence sought to be suppressed. Others, including Thomas, provided additional

evidence. Since the chain of events and the legal consequences flowing from those events are intricate, we set them forth in some detail.

Stopping Thomas's car. On August 4, 1991, Washington was accompanied on patrol by Thomas Knight, a private citizen. Washington saw two cars travelling close together on a highway. Neither the driver of the first car nor the passenger in the second car was wearing a seat belt, as required by state law. Washington pursued them. As the first car moved onto the shoulder, Washington saw the passenger in the second car throw a small package out of the right front window of that car. The first car came to a stop, and so did the second car. Washington called for back-up officers.

Thomas was the driver of the first car. Thomas testified that he was wearing his lap belt but not his shoulder belt.

Washington approached Thomas and told him that he was stopped for failing to wear a seat belt. Upon questioning, Thomas told Washington that he was travelling with the men in

the second car. At Washington's instruction, Knight kept an eye on Thomas, whom Washington instructed to stand where Knight could see him, while Washington went to talk with the two men in the second car. Thomas did not feel free to leave.

Investigation of second car. Milton Rodriguez Valencia wa the driver of the second car, and Victoriano A. Minotta was the passenger. Washington asked them about the package that he had seen thrown from their car, and both denied that anything had been thrown. Valencia and Minotta denied that they were travelling with Thomas.

Officer Mazzola, one of the back-ups, watched Valencia and Minotta while Washington searched the area in which he had seen the package thrown. Washington found a package containing marijuana and rolling papers. Washington arrested Valencia and Minotta for possession of marijuana.

Consent to search. Washington then returned to talk with Thomas. Washington attempted to confirm that Thomas had stated that the was travelling with Valencia and Minotta.

Thomas denied that he was travelling with them and that he had ever said that he was. Washington told Thomas that he had found marijuana in the second car and asked Thomas if his car contained any. Thomas answered, "No, sir, there's nothing in my car." Washington asked, "Do you have a problem with me looking inside of your car?" Thomas responded, "No, you won't find anything in my car." Thomas testified that Washington did not ask his consent to search.

Detention of Thomas. Before the search of Thomas's car, Washington told Thomas that, for Thomas's and Washington's protection, Thomas would be handcuffed. Thomas was then handcuffed while Washington searched his car.

Search of Thomas's car. Washington entered the car and looked around. In an ashtray in the rear of the passenger compartment, Washington found two marijuana cigarette butts.

Arrest of Thomas: Thereupon, Washington arrested Thomas for possession of marijuana. Thomas remained handcuffed.

Search of Thomas. Washington frisked Thomas. He found cigarette rolling papers of the same type that he found in the package that he had just retrieved from the area where he had seen a package thrown.

Full blown search of Thomas's car. Using a certified drug dog, Washington and another officer made a full blown search of Thomas's car. The officers noticed that carpeting in the rear seating area had been altered to cover parts of the doors. The dog identified portions of the car as possibly containing drugs. Using tools, the officers pried off panels to which the dog had alerted, revealing packages.

The officers impounded the cars and found in both cars other concealed compartments that opened electrically. The full blown search of Thomas's car yielded $5000 in cash and 13

packages of cocaine having a combined gross weight of 30.5 pounds. No contraband was found in the second car.

Standard of Review.

In reviewing the denial of a motion to suppress, this court accepts the district court's factual findings unless they are clearly erroneous or influenced by an incorrect interpretation of the law. The evidence is viewed in the light most favorable to the prevailing party. The ultimate question of the legality of the search is a question of law and is subject to de novo review. U.S. v. Cooper, 949 F.2d 737, 744 (5th Cir. 1991), cert. denied, 112 S. Ct. 2945 (1992).

A clearly erroneous finding is one that is not plausible in light of the record viewed in its entirety. Anderson v. Bessemer City, 470 U.S. 564, 573-76 (1985). This court has "long pitched the standard of review for a motion to suppress based on live testimony at a suppression hearing at a high level." U.S. v. Randall, 887 F.2d 1262, 1265 (5th Cir. 1989).

Legality of the Search.

Thomas concedes that the initial investigative stop regarding the seat belt was permissible, and that phase of the events leading to the seizure of the cocaine and cash is not at issue.

Investigation of second car. Thomas argues, though, that the permissible stop became an impermissible arrest when Washington went to question Valencia and Minotta and to look for the package because Thomas was not free to leave. The district court found that Thomas was detained involuntarily, which was a factor weighing against a finding that the consent to search was valid. As discussed below, however, six factors -- not just the involuntariness of Thomas's custodial status -- are considered.

As to Thomas's status when Washington investigated the second car while Knight kept his eye on Thomas, the district court found that Thomas's brief detention at that time was part of a lawful investigatory procedure. A vehicle and its occupants may be briefly detained for investigation based not upon

probable cause but upon reasonable suspicion of criminal activity. The reasonableness of the stop is determined by the totality of the circumstances at the time of the stop. U.S. v. Garcia, 942 F.2d 873, 876 (5th Cir. 1991), cert. denied, 112 S. Ct. 989 (1992).

Such a stop, though, must last no longer than necessary to accomplish the purpose of the stop and should be no more intrusive than necessary to verify or dispel the officer's suspicion in a short period of time. U.S. v. Zukas, 843 F.2d 179, 182 (5th Cir. 1988), cert. denied, 490 U.S. 1019 (1989). Washington stopped the three men and two cars to investigate possible violations of the seat belt law. As the stop was commencing, Washington saw the passenger of the second car expel a package. After Washington stopped the first car, Thomas told Washington that he was traveling with the men in the other car. In light of all of these circumstances, having Thomas stand by while Washington checked out the second car could not be said

to have unreasonably extended the stop beyond the amount of time that Washington needed to verify or dispel his suspicion.

Consent to search. Thomas argues that he did not give valid consent to search the car. The district court found valid consent.

A district court's finding of consent is reviewed for clear error, taking into account six factors that indicate whether the consent was knowing and voluntary. They are

> (1) The voluntariness of the defendant's custodial status; (2) the presence of coercive police procedures; (3) the extent and level of the defendant's cooperation with the police; (4) the defendant's awareness of his right to refuse consent; (5) the defendant's education and intelligence; and (6) the defendant's belief that no incriminating evidence will be found.

U.S. v. Galberth, 846 F.2d 983, 986-87 (5th Cir.), cert. denied, 488 U.S. 865 (1988). No one factor is dispositive. Id. at 987. The totality of the circumstances is considered. Id. at 986. The government must prove consent by a preponderance of the evidence. U.S. v. Hurtado, 905 F.2d 74, 76 (5th Cir. 1990 (en banc).

The district court applied the six factors. It found, first, that Thomas was being detained involuntarily pursuant to a valid investigatory stop, which could weigh against the freedom and volition of the consent. Second, Washington's omission to cite Thomas for a seat belt violation before asking permission to search might have influenced Thomas to consent to curry favor with Washington. This influence would have been minimal, the court determined. The court found no actual coercive procedures.

Third, Thomas was found to have been entirely cooperative with Washington. Fourth, Washington did not inform Thomas that he was free to refuse consent, weighing against voluntariness of consent. Fifth, Thomas, who went through 11th grade in a high school near Houston and dropped out not because of academic difficulty but because he wanted to work, was found to be sufficiently educated and intelligent to know the significance of Washington's request. Sixth, the court found that, because the consent would not reasonably extend to

concealed areas of the car, Thomas likely believed that no incriminating evidence would be found.

Weighing the applicable factors, the court found the consent to have been voluntary. Viewing the totality of the factors in light of the events leading up to the consent, the district court's findings are plausible. They are not clearly erroneous.

The district court applied the correct legal standard to findings that are not clearly erroneous. The consent was, therefore, valid.

Detention of Thomas. Thomas argues that the handcuffing prevented him from revoking the consent. The district court held that the handcuffing of Thomas after the consent was improper. The court, however, emphasized that a valid consent had already been given, noting that the handcuffing would likely have vitiated the consent had the handcuffing preceded the consent.

When an officer detains a suspect illegally, the government has a heavy burden to prove subsequent valid consent. U.S. v. Ruigomez, 702 F.2d 61, 65 (5th Cir. 1983). That is not the situation in the instant case. Thomas gave his consent and then he was handcuffed.

Thomas testified that he did not attempt to prevent Washington from searching his car because. "Nothing I can do handcuffed." The court found this testimony unconvincing. The court found that Thomas found no attempt to revoke his consent and that "Thomas was not placed in a position where a change of heart was impossible to communicate to the officer."

Thomas's testimony that he could not have uttered a protest of the search while he was handcuffed is unconvincing. The district court's finding that Thomas was not prevented from revoking consent is not clearly erroneous, belying Thomas's argument that the handcuffing prevented revocation.

Search of Thomas's car. The district court found that Thomas consented to the initial search of his car. The standard for measuring the scope of consent is objective reasonableness. In other words, what would a reasonable person have understood by the exchange between the officer and the suspect? Florida v. Jimeno, --- U.S. ---, 111 S. Ct. 1801, 1803-04 (1991). Looking in the ashtray is reasonably within the scope of a request to look inside the car.

Arrest of Thomas. The district court held that Thomas's arrest for marijuana possession was invalid because the links between Thomas and the marijuana butts were weak and no good faith exception applied. This holding is not contested.

Search of Thomas. The district court held that the seizure of the rolling papers was the product of a search incident to an unlawful arrest. The court held the evidence of the rolling papers inadmissible. This holding is not contested.

Full blow search of Thomas's car. Thomas argues that the full blown search of the car was unlawful because he had

not consented to such an extensive search. For support, he points to this court's decision in United States v. Ibarra, 965 F.2d 1354 (5th cir. 1992) (en banc), in which an evenly divided court affirmed a district court's decision to suppress evidence found by forcing open boards covering a passage into the attic of a residence where the defendant had consented to a search of the residence. Thomas's case is distinguishable from Ibarra, however, in two key respects:

(1) Thomas's case involves the search of a car, as distinguished from a residence; and

(2) Thomas's consent was preceded by the discovery of the marijuana discarded by someone with whom Thomas said he was travelling and followed by the discovery of the marijuana butts in the ashtray of the car, together creating probable cause to believe that the car contained contraband.

Focusing on the fact that Thomas's case involves the acquisition, subsequent to the original consent, of probable

cause to search a car, we note that the Supreme Court in Carroll v. United States, 267 U.s. 132 (1925), found reasonable under the Fourth Amendment a search by prohibition agents, with probable cause, which consisted of slashing the upholstery of an automobile. Following Carroll, the Court held in United States v. Ross, 456 U.s. 798, 823 (1982), that "[i]f probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." Under circumstances similar to those that obtain here, the Court of Appeals for the Seventh Circuit, in United States v. Garcia, 897 F.2d 1413, 1419-20 (7th Cir. 1990), held that even if the search of door panels of a truck extended beyond the consent given, where the officer conducting the consensual visual search obtained probable cause to believe that the truck contained contraband, the search of the door panels was valid.

Focusing on the chain of events at issue here, the visual search of the automobile pursuant to a valid consent produced

the marijuana cigarette butts which, together with the marijuana discarded by someone with whom Thomas said he was travelling, resulted in probable cause to search the vehicle. Such a search may include areas beyond the scope of the consent. See also California v. Acevedo, --- U.S. ---, 111 S. Ct. 1982 (1991). The district court correctly concluded, therefore, that the search that revealed the packages of cocaine and cash was valid.

AFFIRMED.